SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 468

Edward L. Lascher,

Petitioner,

v.

The State of California,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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SUBJECT INDEX

Page

Citations to opinions below 1

Jurisdiction 2

Questions presented 2

Constitutional and statutory provisions involved 3

Statement of the case 3

Introductory 3

Facts 4

Reasons for granting the writ 9

I. This case, presenting issues of paramount importance, is one of first impression 10

II. A state should not be allowed to abrogate the requirement of effective representation of indigents by the device of refusing to adjudicate controversies concerning that representation 11

III. The simple fact of the practice approved by the decision below is the reduction of indigent representation, in practice, to the level of ineffectiveness 13

A. The fact of ineffectiveness is evidenced by a study conducted by the California State Legislature 14

B. The fact of ineffectiveness is recognized by California appellate judges 15

C. The fact of ineffectiveness is epitomized by a current indigent appeal in a death penalty case 16

D. The fact of ineffectiveness is apparently before this Court in the pending *Anders* case 19

IV. California courts draw an illogical distinction between trial and appellate courts, as to the requirements of effective representation 20

Page

V. The end result is to place a constitutionally intolerable burden on representation of indigents 21

Conclusion 24

Appendices:

Appendix A — Constitutional and statutory provisions involved ..... App., p. 1

Appendix B — Opinion of the Supreme Court of the State of California ..... App., p. 3

Appendix C — Memorandum order of the court of first instance (Superior Court) ..... App., p. 9

TABLE OF CASES

Cases

Page

Anders v. California, Number 1181, *certiorari granted* April 4, 1966 19

Avan v. Municipal Court, 62 Cal.2d 630, 43 Cal.Rptr. 835, 401 P.2d 227 20

Douglas v. California, 372 U.S. 353 ..... 14, 15, 19, 21, 23

Gideon v. Wainwright, 372 U.S. 335 ..... 14, 21, 23

Gill v. Curtis Publishing Co., 38 Cal.2d 273, 239 P.2d 630 4

Halpin v. Superior Court, 240 A.C.A. 791, 49 Cal.Rptr. 857 20

Lascher v. California, 64 A.C. 746, 51 Cal.Rptr. 270, 414 P.2d 398 ..... 1, App. p. 3

People v. Darnold, 219 Cal.App.2d 561, 33 Cal.Rptr. 369 ..... 3, 12, 21

Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977 4

State v. Rush, 46 N.J. 399, 217 A.2d 441 10

Statutes

California Constitution, Article I, Section 13, Clause 6 7

California Penal Code, Section 1241 3

Criminal Justice Act of 1965 22

United States Codes, Title 28, Section 1257(3) 2

Page

United States Constitution:

Fifth Amendment 3

Fourteenth Amendment 2, 3, 7

Rules

Rules of the Supreme Court of the United States, Rule 5 18

Miscellaneous

California Assembly Interim Committee Reports, 1963-1965, Vol. 22, No. 5: *"The Defense of Indigents in Criminal Proceedings"* (January, 1965, page 8 14-15

2 Silverstein (American Bar Foundation): *Defense of the Poor in Criminal Cases in American State Courts*, 67-68 (quoting a statement by the District Court of Appeal of the State of California, Third District) 15-16

Ventura County (Calif.) *Star-Free Press*, July 20, 1966, page A-2 16-17

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EDWARD L. LASCHER,

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THE STATE OF CALIFORNIA,

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Petition for Writ of Certiorari to the Supreme Court of the State of California

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Petitioner, Edward L. Lascher, prays that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of the State of California entered May 26, 1966.

Citations to Opinions Below

The memorandum opinion of the trial court is unreported; it is printed as Appendix C hereto.

The opinion of the California Supreme Court is reported at 64 A. C. 746, 51 Cal.Rptr. 270, 414 P.2d 398; it is printed as Appendix B to this petition.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on May 26, 1966. A timely petition for rehearing was denied, without opinion, on June 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The federal questions sought to be reviewed were raised in the first pleading filed by petitioner herein, the complaint*, and were rejected by sustaining (in effect) a general demurrer to the complaint; they were preserved on appeal in the briefs and were reasserted in the petition for rehearing. Record references disclosing their timely assertion are included in the Statement.

Questions Presented

1. Whether the equal protection or due process clauses of the Fourteenth Amendment prohibit a state from placing a burden upon, or impairment of, the effectiveness of appointed counsel's representation of an indigent who is appealing from a state felony conviction, in the form of either major financial impositions upon appointed counsel or the threat of such impositions.

2. Whether the Fourteenth Amendment prohibits a state from ordering an attorney to donate his monies, goods, and efforts to the public purpose of representing an indigent criminal appellant and thereafter — admittedly unreasonably — refusing to make restitution or reasonable compensation for the money, things and services taken.

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* In a very real sense, many of these questions were presented even before the commencement of this action, in that they were raised in the criminal action which preceded this case. This is demonstrated in the Statement of the Case.

3. Whether, if either or both of those questions is answered in the affirmative, a state may nevertheless withhold judicial relief, by failing or refusing to authorize the state's courts to hear cases presenting those questions.

Constitutional and Statutory Provisions Involved

The provisions of the United States Constitution involved are the just compensation clause of the Fifth Amendment (as it is made binding upon the states by the Fourteenth Amendment) and the equal protection and due process clauses of the Fourteenth Amendment. The relevant California statute, to the extent a statute is involved, is §1241 of the California Penal Code.

These provisions are printed in Appendix A hereto.

Statement of the Case

Introductory

This is an action by an attorney, seeking compensation for services rendered and funds expended at the solicitation of and under appointment by a state appellate court. Those services consisted of conducting the appeals of two indigent state defendants, each of whom was appealing from multiple state felony convictions.*

There are no factual disputes. The judgment of the trial court was rendered on a motion for judgment on the

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* In large part the decisions of the courts below in this case were based on judicially-noticed matters arising in the underlying criminal action in which petitioner's appointed services were rendered, *People v. Darnold*, 219 Cal.App.2d 561, 33 Cal.Rptr. 369. The necessary portions of that judicially-noticed matter are before this Court as part of the record, by stipulation. That underlying case will on occasion be denominated "the *Darnold* appeal".

pleadings, which is the precise equivalent of a common-law general demurrer. All facts alleged in or inferrable from the complaint are therefore conclusively deemed true.*

In the Statement of Facts which follows immediately, the preservation of the federal questions is summarized, with references to the record.

Facts

On March 9, 1962, the District Court of Appeal of the State of California, Second Appellate District, Division One, ordered that petitioner be appointed to represent two indigents in "their appeals herein" [Clerk's Transcript, pages 2 and 10]. The indigents, Darnold and Lenahan, were appealing from their conviction of four separate felonies each.

In the trial court, the indigents had been two of six defendants; the county in which they were tried expended an aggregate of $7,383.75 in payment of fees and costs to appointed counsel for three of the defendants at the trial level, none of whom expended time or efforts greater than petitioner devoted to appellate representation of the two convicted indigents [Application for Attorney's Fees, pages 10 to 11].

The record on appeal consisted of 13 separate volumes of Reporter's Transcript of oral proceedings (an aggregate of more than 3300 pages), together with a lengthy Clerk's Transcript [Application for Attorney's Fees, pages 6 to 7]; it was prepared at an expense to the county of over $2600.00.

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* *Gill v. Curtis Publishing Co.*, 38 Cal.2d 273, 239 P.2d 630; *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977.

In order to perform his representation, petitioner was required to read, reread, index and re-index the entirety of that transcript, the task being increased by the gravity and novelty of the case and the multiplicity of parties and charges. He prepared:

1. An appellants' opening brief;

2. An appellants' reply brief;

3. A Petition for Rehearing; and

4. A Petition for Hearing by the California Supreme Court.

He also participated in oral argument before the District Court of Appeal [Clerk Transcript, page 2 and Application for Attorney's Fees, pages 6 to 7].*

A total of slightly more than 233 hours of petitioner's professional time was reasonably and necessarily consumed in the performance of those services [Clerk's Transcript, pages 2 to 3]. By arithmetic computation, petitioner's necessary and actual cost of maintaining his office and the facilities necessary to the performance of those services (excluding such items as library acquisition and other non-attributable expenses) was the sum

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* A non-indigent co-defendant also appealed, represented by a prominent Los Angeles attorney privately retained and compensated (that compensation running into thousand-dollar multiples). That attorney incorporated, extensively, petitioner's suggestions into the brief prepared for his private client. At oral argument, he expressly adopted the reply brief filed by petitioner on behalf of the indigents, no such brief having been filed for the solvent client. He also adopted, in writing, the petition for rehearing filed in the indigents' behalf and copied, verbatim, substantial portions of petitioner's earlier briefs into his client's separate petition for hearing by the California Supreme Court [Application for Attorney's Fees, pages 11 to 13].

of $9.61 per hour, or an aggregate of $2246.82; those figures were consistent with comparable costs of similarly-situated attorneys in petitioner's community [Application for Attorney's Fees, pages 8 to 10]. In addition, although petitioner actually expended a greater sum, claim was made for only $338.25 in direct, out-of-pocket expenditures necessary to the performance of the representation [Application for Attorney's Fees, pages 3 to 6 and Exhibit A].

Those facts, together with facts concerning the nature of the case and petitioner's education, experience, overhead expenses and the like, were presented to the appointing court upon completion of the state appeal, under oath and in proper form. The application was supported by the declaration of another member of the bar who was familiar with the case and had represented a co-party in the criminal prosecution and by an extended memorandum of points and authorities. It was also supported by a detailed accounting of the monetary expenditures made by petitioner on behalf of the indigents, and a month-by-month itemization (detailed by date, hours expended and things done) of every item of service rendered [Application for Attorney's Fees, in its entirety, and please see particularly Exhibits A, B and C thereto].

On February 25, 1964, the appointing court made its ex parte order, in chambers, ordering that "reasonable compensation should be awarded" to petitioner and that "such reasonable compensation is hereby fixed in the sum of $250.00" [Clerk's Transcript, page 11]. That order was not preceded by any hearing or any opportunity to be heard.

It is admitted that the sum of $250.00 — $88.25 less than the direct cost expenditure, and incorporating no compensation for overhead expense or expenditure of

time — is not, in fact, reasonable compensation, nor does it purport to be, despite the language of the order. Reasonable compensation, under the facts of this case, is admittedly the sum of $8,493.25. California has not paid that reasonable compensation, but has tendered the sum of $250.00, which has been refused [Clerk's Transcript, pages 3 to 5].

On February 28, 1964, petitioner filed with the appointing court the "Petition for Rehearing and/or Reconsideration" which is a part of the record here, challenging that order. It was asserted therein that fixing a sum less than the actual, out-of-pocket expenditure and allowing no compensation for two months' loss of time constituted:

> "[A] denial to the appellants [the indigents] of due process of law and equal protection of the laws, as each of such rights are conferred upon such appellants by Article XIV of Amendments to the United States Constitution and Article I, Section 13, Clause 6 of the Constitution of the State of California, in that the Court's order determines that an indigent criminal defendant for whom counsel is appointed is entitled to effective representation by counsel, and that such entitlement is defeated by the denial to such counsel of reasonable compensation." [Petition, page 2.]

Furthermore:

> "Insofar as the decision and order fail to make reasonable compensation to counsel for the indigent appellants, it [the failure] constitutes a deprivation of constitutional . . . rights of said counsel in that: . . . B. [A failure] to award compensation for the actual sums expended and time and effort devoted to the performance of the appointment, on behalf of the State, constitutes a taking of the property of said

attorney without just compensation . . .". [page 2 to 3.]

It was also specified, among other things, that the practice of making such unreasonable and non-compensatory awards placed an intolerable burden upon attorneys appointed in indigent cases: that of electing among refusal of the appointment, doing an ineffective job, or suffering personal calamity [page 8].

The petition was denied without hearing, receipt of evidence or any other action, on the same day it was filed [Clerk's Transcript, page 12].

Thereupon, petitioner filed the petition for hearing by the California Supreme Court on March 30, 1964, which is a part of the record here. That petition — filed solely in the names of the indigents — presented the issue of invasion of their constitutionally-protected rights, and also the rights of counsel, both in the context of the particular case and in similar indigent cases; it also noted doubt as to the propriety of the remedy, pointing out that there was absolutely no judicial expression on the questions presented [pages 2 to 3 and 9 to 13]. It was summarily denied on April 22, 1964 [Clerk's Transcript, page 13].

Petitioner thereafter unsuccessfully exhausted his administrative remedies under state law [Clerk's Transcript, page 4], and then commenced this action. The respondent State of California appeared by its Attorney General, such appearance being in the form of a motion for judgment on the pleadings [Clerk's Transcript, pages 8 to 9].

The present action sought a declaration of the rights and duties of the parties under the California declaratory relief law. A real and substantial conflict was presented

in that (among other things) a determination of the right to compensation affects the rights of indigent criminal defendants in California, and also in that it affects the rights and interests of attorneys appointed to represent such indigents or contemplating appointment [Clerk's Transcript, page 6]. It was contended that the utilization of petitioner's monies expended, costs of performing the representation and time and effort without making reasonable compensation therefor constituted an unlawful governmental taking without just compensation [Clerk's Transcript, pages 5 to 6].

The trial court granted the state's motion for judgment on the pleadings and entered judgment thereon [Clerk's Transcript, pages 14 to 16].

Reasons for Granting the Writ

Although there are three questions presented, analysis shows that they are but differing approaches to the same essential question. That question, it is submitted, boils down to a stark inquiry:

> Whether appellate representation of indigents (and for that matter their representation in trial courts) can truly be effective if it must be performed under the pain of crushing financial hardship to the appointed lawyer.

Thus viewed, each of the three questions presented is automatically subject to the same answer. For example, if this Court determines that the imposition of such a burden is constitutionally intolerable, then the question of whether the state may withhold a remedy inexorably answers itself.

Therefore, the three questions presented will be discussed together here, the discussion applying equally to each.

I. THIS CASE, PRESENTING ISSUES OF PARAMOUNT IMPORTANCE, IS ONE OF FIRST IMPRESSION.

There is neither space in such a petition as this to cite a collection of authorities for the proposition that the problems of counsel representing indigents are of paramount importance — nor need to cite such authorities to this Court.

In the briefing below, the parties have examined and discussed literally hundreds of exemplars of that importance, ranging from hearings before committees of the Congress through solemn Judicial Council proceedings, law school educational conferences and professional seminars, private and professional foundation studies and surveys, to a virtual avalanche of outpourings in the professional literature. A former Attorney General has recently stated that this is the single most important problem facing the American legal profession. This Court is well aware of these matters.

It is astonishing, therefore, to realize that apparently no case presented to this Court has gone beyond the periphery of these issues and certainly no case has squarely presented them as does the present one.*

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* Several states have resolved the issues in favor of their attorneys on their own, the most recent such resolution being the dramatic holding of the New Jersey Supreme Court in *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (in which the constitutional issues were avoided by holding in favor of compensation on nonconstitutional grounds). Other states have decided against reimbursement or compensation of counsel, although usually with manifest regret and sometimes even anguish. In the vast majority of jurisdictions, however, the question remains painfully unsettled, or else decision has been side-stepped as it was below in this case.

If ever issues were ripe for decision, it would seem that these are.

As will be apparent from the examples which follow of the inadequacy of the indigent representation California presently provides, the consequences which will follow if the issues presented by this case remain unsettled are clear. If the present practice in California — and many, if not most, other states — continues unchecked, effective representation of indigent criminal appellants will continue to be a matter of form and not substance.

This case presents that issue of substance versus form. The brief discussion which follows will attempt to establish the existence of that choice, and then will turn to a review of the present, intolerable inadequacy of California's practice of restricting the effectiveness of appellate representation of indigents to the formality of appointment.

II. A STATE SHOULD NOT BE ALLOWED TO ABROGATE THE REQUIREMENT OF EFFECTIVE REPRESENTATION OF INDIGENTS BY THE DEVICE OF REFUSING TO ADJUDICATE CONTROVERSIES CONCERNING THAT REPRESENTATION.

The holding below is, purely and simply: If either an indigent appellant or his appointed counsel desires to assert a constitutional claim arising out of the appellate proceedings, there is no forum in California in which that claim may be asserted as a *matter of right* — although, admittedly, there exists a possibility that the claim might be heard, as an exercise of grace only, by an appellate court.

Once that gravamen of the holding is recognized, petitioner believes that it becomes clear why the decision of the California Supreme Court should be reviewed, despite

the fact that the opinion below seems at first blush to be plausible and even pedestrian. The words of the decision are innocuous; the holding, examined as above in the context of the case, is utterly improvident in itself and even more startling in its potential ramification of constitutional nullification by the device of withholding a remedy.

No bones should be made about this; withholding of a remedy is the core of California practice, sanctioned by this decision. While the opinion below speaks in terms of "jurisdiction" as between the appellate and nisi prius courts of California, it omits to state the manifest fact that, under this decision, *there is no California court with jurisdiction.*

Petitioner believes that a state is attempting to nullify a right guaranteed under the Constitution every bit as much when it decides that no courts of the state have "jurisdiction" to hear the constitutional question as it is when it affirmatively legislates against a constitutional right.

The opinion below is based on this premise: Since a California appellate court might — as a matter of grace — have heard the issues raised in this case, no other court is open to hear those issues as a matter of right. It is this thesis which petitioner rejects. He submits that the rights and claims of indigent appellants and their appointed counsel are not adequately protected by the mere possibility that they may be recognized as an act of the state court's charity.

It would seem that the present case is, itself, the best evidence of the inadequacy of adjudication-by-grace. In the framework of the *Darnold* appeal, the grace of the District Court of Appeal and of the California Supreme Court were both sought — but withheld. Withheld, it is

to be remembered, despite the fact that admittedly constitutional rights of the petitioner and his clients were affected, that indigent representation was burdened, and that the court's actions regarding petitioner were beyond the realm of reason. It seems clear that, if a court's charity turns a deaf ear to such a factual picture, then charity is not an adequate vehicle for protecting a citizen's rights. The deaf ear of charity in this case is self-condemning.

If a state may empower its courts to elect, as a matter of grace, whether they want to hear or don't want to hear constitutional questions, then petitioner has no case. If a right claimed under the Constitution cannot be urged in a state court unless the state's people or its legislature expressly declare that it may be urged, then petitioner has no case. If a constitutional right can be annulled by allocating the "jurisdiction" of state courts so that none must hear the claim of right, then petitioner has no case. If these possibilities are true, then the court below was unassailably correct in its decision, petitioner has grossly misinterpreted the applicable principles of constitutional law, and this petition should be denied.

III. THE SIMPLE FACT OF THE PRACTICE APPROVED BY THE DECISION BELOW IS THE REDUCTION OF INDIGENT REPRESENTATION, IN PRACTICE, TO THE LEVEL OF INEFFECTIVENESS.

If, however, the mandates of a constitution are of stouter stuff than the possibilities discussed above would indicate, then it is no answer to state that the issues are moot because California did not choose to decide them. It must be determined whether the burdens California

presently places upon the representation of indigent appellants can be tolerated.

Petitioner believes they cannot. Since 1963, the states have been under an absolute constitutional obligation to provide effective assistance of counsel for indigent state criminal defendants, both at the trial level and on appeal. *Gideon v. Wainwright,* 372 U.S. 335; *Douglas v. California,* 372 U.S. 353. Therefore, the states may not trifle with this obligation, whether they would do it affirmatively or, as here, by "recognizing" the right but withholding the remedy.

California does not provide effective appellate representation for indigent appellants.

That is a strong statement, petitioner realizes, but it is also an accurate one. It is not a mere abstraction of pleading — although as a matter of law it is admitted [Clerk's Transcript, page 6]. Ineffective appellate representation in California is a fact — present, existing, inescapable, and not challenged by any responsible person or agency.

A. The Fact of Ineffectiveness is Evidenced by a Study Conducted by the California State Legislature.

At the conclusion of an extended study of the question of indigent representation, the Interim Committee on Criminal Procedure of the California Assembly reported:

> "Through liaison committees with the Judicial Council, the members of the Executive Committee of the Conference of State Bar Delegates and the Board of Governors of the State Bar of California, have heard the frank statement by members of the judiciary that the quality of workmanship in criminal

appeals is of a low order. Instead of a core of perhaps a thousand lawyers skilled in civil appellate practice there probably are no more than fifty in the entire state who are competent in the courts of appeal in criminal cases.

"It follows therefrom that the volunteer lawyers who assist the several district courts and the Supreme Court and are appointed by those courts to represent indigent appellants are drawn essentially from novitiates to the practice whose law school training has been insufficient to acquaint them with the problems at issue and the methods of presentation and preservation of points on appeal favorable to the indigent convicted criminal."

(California) Assembly Interim Committee Reports, 1963-1965, Vol. 22, No. 5: "The Defense of Indigents in Criminal Proceedings" (January, 1965), page 8.

B. The Fact of Ineffectiveness is Recognized by California Appellate Judges.

"In a significant portion of the cases in which counsel are appointed, such counsel write a so-called no-merit letter and do not bother to write a brief, enabling (sic)*

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* Petitioner respectfully submits that this is revealing phraseology, if perhaps unintentionally so. It is petitioner's understanding of the constitutional right to counsel that it means representation in the role of advocate. It is hardly the measure of the advocate's function to state that he has been valuable in enabling the court to make short shrift of his client's cause. That a court, speaking several years after *Douglas* would, nevertheless, cast the lawyer's function in just those terms is illustrative of the problem — particularly when it is realized that the court is in effect *praising* the appointed lawyer's failure and refusal to do the very thing which he was appointed to do.

a swifter disposition . . . Counsel are appointed from a panel of young attorneys who volunteer. Sometimes, through inexperience, these attorneys overlook points, but they are backed up by the court's research attorneys.*"

2 Silverstein (American Bar Foundation): *Defense of the Poor in Criminal Cases in American State Courts,* 67-68 (quoting a statement by the District Court of Appeal of the State of California, Third District).

C. The Fact of Ineffectiveness is Epitomized by a Current Indigent Appeal in a Death Penalty Case.

A recent news item in a California newspaper provides a graphic portrayal of the essence of petitioner's thesis.

"WOMAN TO PLEAD AIKENS CASE BEFORE HIGH COURT

"A Northern California woman lawyer, Mrs. Barbara Goldeen, has been appointed to plead for the life of convicted Ventura murderer Earnest James Aikens, Jr., 20, before the California Supreme Court. [Aikens, a Negro youth, stands senteneed to death for the rape-murder of two white women, one the wife of a police officer.]

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* Research attorneys are law clerks employed by the justices of the California appellate courts.

Once again, there is a revealing insight. It is petitioner's understanding that the function of the indigent's counsel is to be the advocate for his client, and to urge his client's cause before an impartial court. It is *not* petitioner's understanding that the role of the appointed counsel — any more than the privately-retained counsel — is to serve as the spadeworker for a paternalistic court whose employed attorneys will make sure that the defendant is taken care of.

"Mrs. Goldeen, who practices law out of her home in Lafayette, a suburb of Oakland, is now studying the 21 volumes and more than 5,000 pages of record in the case.

"She said today that she has finished reading only two of the transcript volumes.

"• • •

"The trial, including guilt and penalty phases, took 50 days and has cost county taxpayers about $55,000 up to now, according to County Executive Loren Enoch. Aikens has been on Death Row at San Quentin prison since a few days after the sentencing.

"Mrs. Goldeen and her husband, Sam, were both admitted to the state bar last year. He used to be in the clothing business, and then decided, while in his late 30s, to go to law school. Mrs. Goldeen, also in her 30s, said she would go, too. Despite the handicap of having four children, ranging in age from 5 to 14 to care for, she graduated from Golden Gate Law School in San Francisco.

"Both Goldeens were admitted to the bar July 14, 1965. They are now in the process of readying a new office in Lafayette where they will practice as Goldeen and Goldeen.

• • •".

Ventura County (Calif.) *Star-Free Press,* July 20, 1966, Page A-2.

Petitioner wonders how any judge or lawyer -- or anyone, for that matter — could read that item (which, for all petitioner knows, may often be repeated in other appeals less publicized) without an aching mind and con-

science. There is no way of knowing the innate skills of the novice lawyer-wife-mother thus appointed; she may be possessed of consummate brilliance. The facts that a woman accompanies her husband on a switch from the clothing business to the law, or that she mixes housekeeping and child-rearing with the practice of law do not necessarily render her representation inadequate. The fact that the ink is still drying on her diploma from a lightly-regarded law school does not mean that she is not a gifted and dedicated advocate. Indeed, she may have the incentive and qualification to handle some minor, relatively routine felony appeal—although one is inclined to question whether there is such a thing as a felony that minor, at least to the person who stands convicted of it.

But, would the members of this Honorable Court appoint one of their new law clerks — the most outstanding law graduates of the finest law schools in the country, selected only after utmost screening and the most spirited competion — to represent *any* indigent on appeal?

Of course not. Those clerks — as is true of Mrs. Goldeen — would not possess the minimum qualification under Rule 5. Even more importantly, one doubts that the members of this Court would believe that they would be providing the necessary effectiveness. Perhaps equally clearly, a young lawyer with the intelligence and judgment necessary to be appointed as a law clerk to a justice would have the good sense to know the limits of his own knowledge and experience and would therefore be the last to deem himself qualified.

Not so the lawyer to whom California entrusts the life of an impoverished negro youth awaiting execution for two emotionally-charged convictions following a cause celebre of a trial. It may be a measure of the judgment and intelligence of the lawyer appointed to defend his

life that she accepted the appointment and apparently sees nothing wrong with learning how to practice law in a case of that gravity. That may well be the best evidence of the caliber of indigent appellate representation which California affords, years after *Douglas*.

There is little doubt that any layman who becomes aware of such a macabre farce as that appointment will inevitably suffer a reaction of cynicism and disrespect for the legal process. One may well say that California is getting what it pays for or what it deserves, but the indigents, the people of the state and the Constitution deserve better.

There is something amiss in the State of California, in its treatment of indigents. Other examples of the fact could be produced, and were in the briefing below, but the point seems clear. However "forward"* the lip service which California pays to the hollow ritual of appointment, the fact of what the state does to the appellate representation of indigents is something quite different, something indefensible, something which this Court's review of the present decision should rectify.

D. The Fact of Ineffectiveness is Apparently Before This Court in the Pending *Anders* Case.

In fact, it appears that this Court is even now scrutinizing one aspect of California's treatment of indigent appellants in *Anders v. California* (certiorari granted April 4, 1966), Number 1181. Apparently Anders was an indigent who was unfortunate enough to be represented by one of those "no merit" appointed "advocates" so tragically common to — and even praised by — the California courts. From the granting of certiorari, it would seem

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* *Douglas v. California*, 372 U.S. at 355.

that this Court entertains the belief that the constitutional obligation to provide counsel goes somewhat beyond the barren formality of appointment, and reaches the stage of requiring that the attorney *represent* after he has been appointed.

That is what this petition is urging: That the attorney be required to represent, that he be enabled to represent and that he not be burdened in representing or penalized for representing.

IV. CALIFORNIA COURTS DRAW AN ILLOGICAL DISTINCTION BETWEEN TRIAL AND APPELLATE COURTS, AS TO THE REQUIREMENTS OF EFFECTIVE REPRESENTATION.

Somewhat ironically, the appellate courts of California —which cast such a jaundiced eye upon the role of the advocate in the very cases which are before them—are diligent in facilitating effective representation at the trial level. The California courts have clearly determined that the state's trial courts (and, consequentially, California local-government agencies) must make reasonable compensation to appointed attorneys for their services in the trial courts, not only as a right of the attorney but also in order to accomplish the effective performance of his role as the indigent's advocate. *Avan v. Municipal Court,* 62 Cal.2d 630, 43 Cal.Rptr. 835, 401 P.2d 227; *Halpin v. Superior Court,* 240 A.C.A. 791, 49 Cal.Rptr. 857.

It is only when the indigent's case leaves the trial court and enters the appellate halls — and consequently, when it is the State's treasury which is affected, and not that of the county — that the Constitution fails to follow.

California recognizes both *Gideon* and *Douglas*, but it only provides machinery and remedy for *Gideon*. The distinction escapes petitioner.

V. THE END RESULT IS TO PLACE A CONSTITUTIONALLY INTOLERABLE BURDEN ON REPRESENTATION OF INDIGENTS.

California has placed a burden upon *Douglas* which this Court never sanctioned — the burden of making the caliber of an indigent's defense on appeal depend upon either the absolute heroism of his appointed counsel, or that counsel's ability and willingness to suffer crushing economic burdens as the price of representing his client.*

Petitioner does not claim to have been a hero in his performance of the indigent defense in the *Darnold* appeal. After all, at that time he had not yet learned that he and all others like him were outcastes of the legal system; he thought the Constitution would protect him and enable him to protect his clients. Petitioner had no idea of the blow that was to fall; true, he never expected to be compensated under the same standards as in a private employment, but neither did he expect to be, in effect, taxed financially disastrous sums for performing the state's burden. Petitioner did not courageously do the best he could despite the fact that he would wind up penalized thousands of dollars and two months of time; he did not know that fate awaited him, so he acted in the valor of ignorance.

Now, however, he knows the price a lawyer may have to pay if he dares to be the advocate of an indigent ap-

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* In this case, petitioner sustained a tangible monetary loss of almost three thousand dollars. He and his family also, of course lost two months of his earning capacity.

pellant. And petitioner is not alone. The entire California bar knows it and that very knowledge is the rub. Now it *will* take real valor for an attorney to do his best on any substantial California indigent appeal. The reason is that he must choose between inflicting the hardship of crushing financial burdens upon himself and his loved ones, on the one hand, or inflicting the hardship of token representation (or at best, bare-minimum representation) on his indigent client.

Undoubtedly there will be lawyers whose moral fiber is strong enough that they will provide adequate defense even at the cost it inflicts upon themselves and those dear to them.* Equally undoubted is the fact that there will be those — and not a few of them — not zealous enough to court such a disaster, particularly now that they know from the outset what is facing them. At best they will attempt to evade or refuse appointment; a bare 1% of the California bar participates in this function, with the burden falling repeatedly on the 1% and never on the 99%. At worst they will accept appointment (or be unable to escape it) and will mitigate their loss at the cost of the representation they provide the indigent.

Either way, it is the indigent who loses. He loses not only because the 99 will not come to his defense nor be-

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* The unique circumstances of this case allow petitioner to assert that the financial calamity is anything but an academic proposition. To many the loss of a sixth of a year's income plus more than $2500 may not seem intolerable, but few would pass it off as inconsequential. It approached forcing petitioner from his chosen profession, and required years for economic recovery. The pages of the Congressional hearings on the Criminal Justice Act of 1965 are replete with examples of lawyers brought to their knees by the exercise of their privilege of carrying the state's burden in indigent defense.

cause his appointed advocate may shirk his cause; he loses even if he has a lawyer who will attempt to follow the path of heroism, because that lawyer must still wrestle with his own conscience and resist his own fear. That is the invidious discrimination.

The indigent who needs appellate counsel *may* have the services of a willing, heroic, self-disciplined, wealthy bachelor with no other pressing legal business. Then, he will start even with the solvent appellant.* Or, he may at least be fortunate enough to get some combination of those factors, thereby suffering only "a little inequality" because of his poverty. Or, he may get none. That is the risk he takes. That is the risk the Constitution will not suffer. That is the risk this Court, for the first time, is called upon to appraise.

An appellate judicial system which depends for its effectiveness, in the case of indigents, upon being staffed by willing, heroic, self-disciplined, wealthy bachelors, without other pressing legal business is neither realistic, nor practical, nor in conformity with the constitutional requirements enunciated frequently, but particularly in *Gideon* and *Douglas*. The Constitution is not satisfied by *calling* a system effective; it must *be* effective. California has said that the name is enough, and the results are obvious.

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* This is a significant point, that of starting even. It gives the lie to those who argue that the Constitution does not guarantee an equally adroit or skilfull counsel. Of course it does not; it only guarantees an equal start. But all of the qualifications listed are necessary to even reach the starting line and to start finding out about ability.

Conclusion

Petitioner respectfully submits that review by this Court is necessary, for the sake of the lawyers — and more pressingly their indigent clients — of California, but also all of the other states who have received no guidance on this question. This Court's clear statement that the Constitution means what it says and that the states must carry it out, in the case of indigents and their lawyers just as all others, will not only be a mandate to the state legislatures, but also a powerful weapon in the hands of many state courts which have been frustrated by penuriousness and apathy in these areas.

Upon review, the authorities collected by both sides below and those which may later be briefed will, it is believed, disclose ample and inescapable reason to vacate the judgment below and remand it so that the California courts, under the admitted facts, can afford petitioner reason and compensation and can remove the unconstitutional burdens and risks upon indigent appellate representation in California, all in the exercise of their fundamental power and jurisdiction to enforce the mandates of the United States Constitution as courts sworn from the very outset to uphold that organic law.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

Edward L. Lascher,

Petitioner, Pro Se.

APPENDIX A

Constitutional and Statutory Provisions Involved

FIFTH AMENDMENT

(Material Portion)

". . . nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT, SECTION 1

(Material Portion)

"No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PENAL CODE OF CALIFORNIA, SECTION 1241

(As it existed at all material times; the section has since been amended in particulars which do not affect this case.)

"In any case in which counsel has been appointed by the Supreme Court or by a district court of appeal to represent a party to any appeal or proceeding in a criminal matter, the court shall fix a reasonable fee for such counsel which shall be paid from the General Fund. Claim for the payment of such fee shall be presented by counsel to the clerk of the court allowing such fee in such form

as the clerk shall prescribe. If the claim is in order, the clerk shall transmit it to the State Controller who shall draw his warrant in payment thereof and transmit it to the clerk for delivery to the payee."

APPENDIX B

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, In Bank.

Edward L. Lascher, Plaintiff and Appellant, v. State of California, Defendant and Respondent. No. L.A. 28544.

Filed: May 26, 1966.

Plaintiff appeals from a judgment of the superior court granting defendant's motion for a judgment on the pleadings.

Facts: Plaintiff, an attorney at law, was appointed by the District Court of Appeal, Second Appellate District, Division One, to represent two defendants in the case of People v. Darnold (219 Cal.App.2d 561). He has performed the duties for which he was appointed.

August 26, 1963, the District Court of Appeal filed its opinion affirming judgments of conviction. October 23, 1963, this court denied a petition for hearing. February 17, 1964, the United States Supreme Court denied a petition for writ of certiorari (Darnold v. California, 376 U.S. 927).

Thereafter, plaintiff made application to the District Court of Appeal for "reasonable compensation." February 25, 1964, the District Court of Appeal ordered "that such reasonable compensation [under the provision of Penal Code section 1241] is hereby fixed in the sum of $250.00." February 28, 1964, plaintiff filed a petition for

rehearing and/or reconsideration of the order awarding compensation, which petition was denied.

Plaintiff then petitioned this court for a hearing, seeking a determination by us that the District Court of Appeal abused its discretion in making the award. April 22, 1964, the petition was denied.

Thereafter, plaintiff filed the present suit against the State of California, seeking compensation for the services rendered by him, as set forth above. Plaintiff alleges that he worked 233.8 hours on the case, and made expenditures of $338, in proceedings before the District Court of Appeal and this court.

Prior to 1941, no provision was made in this state for the payment of court-appointed attorneys. Such counsel had theretofore served without pecuniary compensation, thus honoring the long recognized concept of the profession that "It is the duty of an attorney: . . . Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed." (Bus. & Prof. Code, § 6068, subd. (h).)

By a 1941 statute, the Legislature formulated a somewhat different policy, contemplating that court-appointed attorneys should no longer be required to bear the entire financial burden of accepting appointment as defense counsel in the trial courts.

Thus, in 1941 the Legislature adopted section 987a of the Penal Code to provide for compensation of counsel assigned to represent indigent defendants in certain criminal proceedings in the trial courts. The scope of the legislative enactment has been broadened by subsequent amendments and presently authorizes the payment of reasonable compensation, together with necessary

expenses, to counsel assigned in any of such courts to represent indigent defendants charged with the commission of a crime.

No authorization for the payment of court-appointed appellate counsel existed in this state prior to 1955. By the enactment of section 1241 of the Penal Code in that year, however, the appellate courts were authorized to award a "reasonable fee" for the services of counsel appointed to represent indigent defendants on appeals in criminal matters.

At the time the District Court of Appeal made its order in the present case, section 1241 of the Penal Code provided: "In any case in which counsel has been appointed by the Supreme Court or by a district court of appeal to represent a party to any appeal or proceeding in a criminal matter, the court shall fix a reasonable fee for such counsel which shall be paid from the General Fund. . . ."[1]

Question: *Did the superior court have jurisdiction to award plaintiff compensation for his services as court-appointed counsel in the District Court of Appeal?*

No. The District Court of Appeal, acting under section 1241 of the Penal Code, awarded plaintiff a sum which it determined to be a reasonable fee for his serv-

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[1] In 1965 section 1241 of the Penal Code was amended to read: "In any case in which counsel has been appointed by the Supreme Court or by a district court of appeal to represent a party to any appeal or proceeding in a criminal matter, such counsel shall receive a reasonable sum for compensation and necessary expenses, the amount of which shall be determined by the court and paid from any funds appropriated for that purpose. . . ."

ices.[2] His claim for compensation was passed upon by the District Court of Appeal again when it denied his petition for reconsideration and was also passed upon by this court when it denied his petition for hearing.

Plaintiff's claim and the issues presented therein cannot be relitigated in the superior court. To do so would violate a fundamental principle of our system of jurisprudence, that a lower court is bound by the findings, judgments, orders, and opinions of a higher court. (See Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455.)

Accordingly, since the superior court could not make an award to plaintiff without reviewing the order of the District Court of Appeal and the order of this court denying a hearing, it lacked jurisdiction to proceed and therefore correctly granted defendant's motion for a judgment on the pleadings.

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[2] In Hill v. Superior Court, 46 Cal.2d 169, in construing the term "reasonable sum for compensation," as used in section 987a of the Penal Code, we held: ". . . the criteria to be used in determining a 'reasonable sum' for compensation in this type of case are not the same as those ordinarily used in fixing fees for services performed as the result of a private transaction between counsel and a solvent client." (P. 174 [1b].)

In that case we adopted the following criteria as providing at least one set of standards for determining the "reasonableness" of fees awarded appointed counsel: (1) The practice in other jurisdictions; (2) the minimum fee schedule adopted by the local bar association; (3) the compensation paid to public officers; and (4) the attorney's duty to the defenseless or the oppressed. These criteria were held to have been satisfied in the *Hill* case.

If they deem it advisable to do so, the Legislature or the people on an initiative amendment may alter the present rule.

The judgment is affirmed.

McCOMB, J.

WE CONCUR:

TRAYNOR, C. J.

PETERS, J.

TOBRINER, J.

PEEK, J.

MOSK, J.

BURKE, J.

APPENDIX C

MEMORANDUM ORDER OF THE COURT OF FIRST INSTANCE (SUPERIOR COURT).

"Heretofore submitted; court rules:

"Motion for judgment on the pleadings is granted.

"In exercise of its discretion, the Court has concluded that declaratory relief is inappropriate, because the remedies sought in the first two counts of the complaint are fully adequate to dispose of the entire controversy. Upon this ground and upon the further ground that a declaration, if made, would be that plaintiff has no claim for compensation in excess of that ordered February 25, 1964 by the District Court of Appeal, the court grants the motion in respect of the declaratory relief count.

"Defendant to give notice.

"Counsel notified by mail."

SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement of the case	3
Argument	6
I. The state court judgment rests upon an adequate and independent non-federal ground	6
II. The order of the district court of appeal awarding reasonable compensation is res judicata	8
III. There was no "taking" of petitioner's services and that which is alleged to have been taken is not a compensable property interest	9
IV. No other federal questions are properly presented	12
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases	Page
Angel v. Bullington, 330 U.S. 183	8
Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P. 2d 937	5, 6
Baltimore S.S. Co. v. Phillips, 274 U.S. 316	9
Betts v. Brady, 316 U.S. 455	8
Butler v. Perry, 240 U.S. 328	11
Copperweld Steel Co. v. Industrial Comm'n, 324 U.S. 780	7
Darnold v. California, 376 U.S. 927	3
Eustis v. Bolles, 150 U.S. 361	7
Farson, Son & Co. v. Bird, 248 U.S. 268	7
Grubb v. Public Utilities Comm'n, 281 U.S. 470	8
Haley v. Breeze, 144 U.S. 130	7
Herb v. Pitcairn, 324 U.S. 117	7
Lascher v. State of California, 64 A.C. 746	5
McCoy v. Shaw, 277 U.S. 302	7
McKane v. Durston, 153 U.S. 684	7
Northern Pac. R.R. v. Ellis, 144 U.S. 458	7
People v. Darnold, 219 Cal. App. 2d 561, 33 Cal. Rptr. 369	3, 6, 7
Powell v. Alabama, 287 U.S. 43	10
Robertson v. Baldwin, 165 U.S. 275	11
Rooker v. Fidelity Trust Co., 263 U.S. 413	8
Selective Draft Law Cases, 245 U.S. 366	11
State v. Rush, 46 N.J. 399, 217 A. 2d 441	13
United States v. Dillon, 346 F. 2d 633, cert. den., 382 U.S. 978	10

Statutes

	Page
Act of 1964, 78 Stats. 552	11
California Code of Civil Procedure, Sec. 1061	4
California Penal Code, Sec. 1241	3, 4, 5, 11
California Statutes of 1965, Chap. 1410	11
New York Session, Laws 1965, Chap. 878	11
New York County Law, Secs. 722-722(e)	11
United States Code, Title 18, Sec. 3006A	11
United States Code, Title 28, Sec. 1257	8
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Fifth Amendment	2, 9, 10
United States Constitution, Fourteenth Amendment	2

Textbooks

49 Minnesota Law Review (1965), pp. 553, 558	12
1 Nichols, Eminent Domain (3d Ed., 1964), Sec. 1.4(3)	11
12 University of California at Los Angeles Law Review (1965), pp. 668, 676-677	12
113 University of Pennsylvania Law Review (1965), pp. 769-770	12

IN THE

Supreme Court of the United States

October Term, 1966
No. 468

EDWARD L. LASCHER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Brief for the State of California in Opposition.

Opinion Below.

The opinion of the Supreme Court of the State of California is reported at 64 A.C. 746, 51 Cal. Rptr. 270, 414 P. 2d 398. (Pet. App. "B" pp. 3-7.)

What petitioner refers to as the unreported memorandum opinion of the trial court (Pet. App. "C" p. 9) is the minute order appearing at page 14 of the Clerk's Transcript. The actual judgment of the trial court appears at pages 15-16 of the Clerk's Transcript.

Jurisdiction.

The judgment of the Supreme Court of the State of California was entered on May 26, 1966. The order of the Supreme Court of the State of California denying a timely petition for rehearing was entered on June 22, 1966. The petition for a writ of certiorari was filed on August 23, 1966.

Petitioner purports to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). However, as is apparent from the opinion below, the state court decision rests upon an adequate and independent non-federal ground; no federal question was necessarily presented for decision and none was in fact decided. This Court has consistently held that its certiorari jurisdiction over state court decisions does not extend to cases of this nature.

Questions Presented.

1. Whether the judgment of the Supreme Court of the State of California is based upon an adequate and independent non-federal ground.
2. Whether petitioner's present action is barred by the doctrine of *res judicata*.
3. Whether a substantial federal question is presented by petitioner's contention that an attorney who has been appointed by a state appellate court to represent an indigent criminal appellant and who has received limited compensation under state law is entitled under the Fifth and Fourteenth Amendments to additional "just compensation" under eminent domain standards.

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides in relevant part, as follows:

> ". . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part, as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1241 of the California Penal Code, as it existed up to the time of its amendment in 1965, provided in relevant part, as follows:

> "In any case in which counsel has been appointed by the Supreme Court or by a district court of appeal to represent a party to any appeal or proceeding in a criminal matter, the court shall fix a reasonable fee for such counsel which shall be paid from the General Fund. . . ."

Statement of the Case.

Petitioner, an attorney at law, was appointed by the District Court of Appeal of the State of California, Second Appellate District, as attorney for two indigent criminal appellants in the matter of *People v. Darnold,* 2d Crim. No. 8130.[1] Petitioner performed the duties to which he had been appointed. On August 26, 1963, the District Court affirmed the judgment below, and on October 23, 1963, the California Supreme Court denied the petition for hearing. See *People v. Darnold,* 219 Cal. App. 2d 561, 584, 33 Cal. Rptr. 369. A petition for writ of certiorari was filed on behalf of said criminal appellants by counsel other than petitioner. This court denied the petition for certiorari on February 17, 1964. *Darnold v. California,* 376 U.S. 927.

Thereafter, petitioner, in the name of his clients, applied to the appointing court for "reasonable compensation." On February 25, 1964, the District Court of Appeal, Second Appellate District, pursuant to said application, ordered that reasonable compensation, pursuant

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[1]Petitioner alleges in his complaint that prior to being appointed, he was "requested" to accept an appointment and that petitioner thereupon "acknowledged his willingness to accept such appointment. . . ." [Clk. Tr. p. 2.]

to the provisions of Penal Code section 1241, be paid in the sum of $250. [Clk. Tr. p. 11.] A petition for rehearing and/or reconsideration of this order was filed on February 28, 1964, and subsequently denied. [Clk. Tr. p. 12.] Petitioner then filed with the California Supreme Court a petition for hearing on the order fixing his compensation. This petition for hearing was denied on April 22, 1964. [Clk. Tr. p. 13.] No petition for writ of certiorari was filed with this court from this final order, entered after judgment on the merits by the district court of appeal.

On December 15, 1964, petitioner filed a complaint in the Los Angeles Superior Court based on three causes of action. The first cause of action [Clk. Tr. pp. 1-4] is a *quantum meruit* count for the reasonable value of petitioner's services. The second cause of action [Clk. Tr. pp. 4-5] is for the taking of "valuable property" of petitioner for a "public purpose." The third cause of action [Clk. Tr. pp. 5-6] is for declaratory relief, pursuant to state law, for a declaration of rights arising out of this asserted controversy.

Pursuant to the granting of respondent's motion for judgment on the pleadings, the trial court entered its judgment, finding that each of the first and second causes of action of the complaint failed to state facts sufficient to constitute a cause of action. On the declaratory relief cause of action the court, in the exercise of its discretion under state law (Cal. Code Civ. Proc., §1061), determined that this was a proper case to with-

hold the granting of declaratory relief. [Clk. Tr. pp. 15-16.]

On direct appeal to the California Supreme Court, the court affirmed the judgment of the trial court on the sole ground that the superior court lacked jurisdiction to award petitioner additional compensation for his services as court-appointed counsel in the district court of appeal. *Lascher v. State of Calif.*, 64 A.C. 746. The state supreme court pointed out that the district court of appeal, acting under section 1241 of the California Penal Code, awarded petitioner a sum which that court determined to be reasonable; that petitioner's claim for compensation was passed upon again by that court when it denied his petition for reconsideration and was also passed upon by the state supreme court when it denied his petition for hearing. As, under California law, a lower court is bound by the findings, judgments, orders, and opinions of a higher court (see *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455), the superior court lacked jurisdiction to proceed, since it could not make a further award to petitioner without reviewing the order of the district court of appeal and the order of the state supreme court denying a hearing.

ARGUMENT.

I.

The State Court Judgment Rests Upon an Adequate and Independent Non-Federal Ground.

The decision of the California Supreme Court is clearly based on a non-federal ground, *i.e.*, that the superior court, in which petitioner instituted this action, lacked jurisdiction of the subject matter because a decision by that court would necessarily have entailed review of a previous order of a higher state tribunal, the district court of appeal. This ground is clearly adequate, is independent of the sole federal question petitioner attempted to raise, and is tenable.

In substance, petitioner sought by this action to relitigate in the superior court the order of the district court of appeal made in *People v. Darnold,* on February 25, 1964. The state supreme court, consistent with established state law, see *Auto Equity Sales, Inc. v. Superior Court,* 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 323-324, 369 P. 2d 937, 939-940, and cases cited therein, held that the superior court was without jurisdiction. 64 A.C. at 748-749. Thus, it was clearly unnecessary to, and the state supreme court did not, reach the just compensation issue.

Petitioner has attempted to skirt this broadly tenable non-federal ground upon which the state court judgment rests by his characterization of the holding below: If an indigent's appointed counsel "desires to assert a constitutional claim arising out of the appellate

proceedings, there is no forum in California in which that claim may be asserted as a *matter of right. . . .*" (Pet. p. 11.) What petitioner fails to mention is that his claim has been decided once as a matter of right by the appellate court in *People v. Darnold.* What he seeks by this proceeding is a review of that determination of an appellate court. Review of claims, once adjudicated, as a matter of right must end somewhere. In California the determinations of an intermediate appellate court (much like federal practice) are, for the most part, not reviewable as a matter of right. And surely they should not be reviewable by an inferior trial court. In any event, the constitution does not require that a review be granted as a matter of right. *McKane v. Durston,* 153 U.S. 684, 687 (1894).

It is submitted that the decision below rests upon a broad and tenable state ground, consistent with prior decisions. *McCoy v. Shaw,* 277 U.S. 302 (1928); *Farson, Son & Co. v. Bird,* 248 U.S. 268, 271 (1919). The adequate and independent state ground upon which the judgment below rests, precludes the exercise of this Court's certiorari jurisdiction. *Copperweld Steel Co. v. Industrial Comm'n,* 324 U.S. 780 (1945); *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Eustis v. Bolles,* 150 U.S. 361 (1893); *Northern Pac. R.R. v. Ellis,* 144 U.S. 458 (1892); *Haley v. Breeze,* 144 U.S. 130 (1892).

The petition for writ of certiorari should be denied on this ground alone.

II.

The Order of the District Court of Appeal Awarding Reasonable Compensation Is Res Judicata.

Petitioner appears also to have mistaken his remedy before this Court. If he believed that the final order of the district court of appeal of February 25, 1964, involved the drawing into question of any federal right claimed by him his remedy was to file a timely petition for writ of certiorari after the denial of a hearing by the state supreme court. Although the order was made in chambers upon an *ex parte* application it was undoubtedly a final judgment or decree in the matter "rendered by the highest court of a State in which a decision could be had," within the meaning of the Judicial Code. 28 U.S.C. §1257. See *Betts v. Brady*, 316 U.S. 455, 458-461 (1962). However, petitioner chose not to seek certiorari from the order awarding him reasonable compensation—from the proceeding in which his claim was heard and determined as a matter of right.

Under these circumstances it is submitted that petitioner is now barred by the doctrine of *res judicata*. *Angel v. Bullington*, 330 U.S. 183 (1947); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The grounds now being urged by petitioner as constituting error by the district court of appeal in awarding him less compensation than be demanded were available to him in the prior proceeding and were, in fact, urged by him as grounds for reconsideration and for a hearing by the state supreme court on the prior order. (Petition for Rehearing and/or Reconsideration; Petition for Hearing.) *Cf.*, *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 479 (1930).

What petitioner is now urging, in essence, is that the order of the district court of appeal of February 25, 1964, is based upon an erroneous view of the law. Yet he chose not to seek certiorari, from that order; having failed to seek direct review he cannot now collaterally attack that order by a new action.

> ". . . Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not. A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause. [Citations omitted.]"
>
> *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 325 (1927).

III.

There Was No "Taking" of Petitioner's Services and That Which Is Alleged to Have Been Taken Is Not a Compensable Property Interest.

Petitioner's complaint in the trial court presented only a single constitutional question, whether or not there had been a taking of his services for a public use without just compensation under the Fifth Amendment. [Clk. Tr. pp. 4-5.] Petitioner's contention that the failure of the California District Court of Appeal to compensate him in accordance with the eminent domain standard of just compensation or "fair market value" is neither meritorious nor of sufficient substantiality; furthermore, petitioner's contention is not in accord with applicable decisions of this Court.

This Court has stated that, "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell v. Alabama,* 287 U.S. 43, 73 (1932). Citing *Powell,* the Ninth Circuit has recently held that there is no "taking", in the constitutional sense, when an attorney is called upon to perform "an obligation imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice." *United States v. Dillon,* 346 F. 2d 633, 636 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (prelim. print 1966). Respondent is aware of no case to the contrary decided under the Fifth Amendment to the United States Constitution.

Moreover, a lawyer's "professional time" and "professional services" are not "property" within the meaning of the just compensation clause of the Fifth Amendment. It is well established that when that which has been taken is not property the loss is not compensable under the principle of just compensation. Government conscription of personal services is not governed by eminent domain.

> "The power of calling upon inhabitants whose services are particularly needed to perform those services is still recognized as an attribute of sovereignty. Thus, in England and some of the older states in America, members of a municipal corporation may be compelled to accept municipal offices, even without compensation. Other familiar examples of the power are the compulsory attendance of witnesses and jurors in court, and the drafting of soldiers. . . .

> "Although it is necessary to provide compensation in such cases, the stipened allowed is given as a matter of policy, to keep the persons whose services have been required and their families from starvation, rather than as a constitutional obligation. At any rate the compensation is awarded upon a different principle from that employed when property is taken by eminent domain, as the method sanctioned by ancient practice is to pay all persons alike, regardless of what their time, or services may be worth. A statute applying the same method to eminent domain and fixing a uniform price for land taken for the public use, regardless of its actual value, would be clearly unconstitutional." (Footnotes omitted.)
>
> 1 Nichols, Eminent Domain, §1.4[3] (3d Ed., 1964).

Petitioner in the case at bar has received the stipend allowed under state law, as construed by a state court. He is constitutionally entitled to no more. *Selective Draft Law Cases,* 245 U.S. 366 (1918); *Butler v. Perry,* 240 U.S. 328 (1916); *Robertson v. Baldwin,* 165 U.S. 275 (1897).

The indigent's right to counsel is a rapidly evolving area of the law. How best to meet the needs in this area is essentially a matter of legislative concern, involving complex legislative judgments. The process of legislative response has already begun. *E.g.,* Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. §3006A; N. Y. Sess. Laws, 1965, ch. 878, N.Y. County Law, §§722-722(e); Cal. Stats. 1965, ch. 1410 (amending Cal. Pen. Code, §1241). Therefore, it would appear to be particularly undesirable to "freeze" the development of this

area in the rigid constitutional requirements of just compensation. To do so would foreclose any meaningful choice of policy and would draw into serious question the constitutionality of recent legislation, both federal and state, in this area. See Comment, 49 Minn. L. Rev. 553, 558 (1965); Comment, 113 U. Pa. L. Rev. 769, 770 (1965); Note, 12 U.C.L.A. L. Rev. 668, 676-77 (1965).

This question is not of sufficient substantiality to require review by this Court.

IV.

No Other Federal Questions Are Properly Presented.

Petitioner asserts that one of the questions presented by his petition is, "Whether the equal protection or due process clauses of the Fourteenth Amendment prohibit a state from placing a burden upon, or impairment of, the effectiveness of appointed counsel's representation of an indigent who is appealing from a state felony conviction, . . ." (Pet. p. 2.) It is submitted that this question was not presented by petitioner's complaint in the trial court, and even if the complaint could be construed as attempting to present this question, petitioner is without standing to raise it.

As petitioner himself states, "This is an action by an attorney, seeking compensation for services rendered. . . ." (Pet. p. 3.) This is *not* a petition of an indigent appellant claiming that he was deprived of effective representation by his appointed counsel. Whether

or not appointed counsel performed his representation effectively can only be raised by the indigent, it is his right—not the right of the attorney. See *State v. Rush*, 46 N.J. 399, 217 A. 2d 441, 444 (1966).

As previously noted, the indigents whom petitioner has represented in the state appellate courts petitioned this court for a writ of certiorari to review their state conviction. Nowhere in their lengthy petition of 21 pages (filed by other counsel) is the issue of the effectiveness of appointed counsel's representation before the state appellate court mentioned. See Petition for Writ of Certiorari, *William Henry Darnold and John Lenahan, Petitioners v. People of the State of California, Respondent*, No. 925 Misc., October Term, 1963. That proceeding has long since become final and, in any event, petitioner herein has no standing to raise this issue in this action.

The complaint in this action is framed in terms of the appointed counsel's right to compensation (and prays for money damages), not in terms of the indigent's right to effective representation. No allegation in the complaint even remotely suggests the presence of this latter issue in this case. No such issue being raised in the first instance, it follows that the issue was not before the state supreme court for review. The issue was not properly raised in the trial court and petitioner, in any event, obviously has no standing to raise it. It cannot properly be brought before this Court for "review" on certiorari.

Conclusion.

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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